

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of B.W.)	
And)	
MSD Perry Township, and)	Article 7 Hearing No. 1306.02
RISE Special Services)	
)	
Appeal from a Decision by)	
Rolf W. Daniel, Ph.D.)	
Independent Hearing Officer)	

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW, WITH ORDERS

Procedural History

It should be noted from the outset that any references to the “Student” or the “Student’s representative” include the Parent or Parents of the Student. It should also be noted that MSD Perry Township and RISE Special Services will be referred to collectively as the “School.”

On August 28, 2002, the Student filed a request for a due process hearing with the Indiana Department of Education. An Independent Hearing Officer (IHO) was appointed on August 28, 2002. A Pre-hearing Notification, dated September 8, 2002, was mailed to the parties by the IHO regarding a pre-hearing teleconference scheduled for September 12, 2002. On the date of the scheduled pre-hearing conference, the parent indicated that she was not going to participate in the pre-hearing conference because she had not received notification of the pre-hearing conference until the evening of September 11, 2002, and that her advocate was unable to attend. A Pre-hearing Notification, dated September 18, 2002, was mailed to the parties by the IHO regarding a pre-hearing teleconference scheduled for September 24, 2002. The parent did not attend the September 24, 2002 pre-hearing conference and written notification was returned to the IHO by the United States Postal Service, indicating the letter had been unclaimed.

The IHO issued a notice of Receipt of *Ex Parte* Communication to the parties, dated September 10, 2002, regarding information from the School. On September 24, 2002, an e-mail was received from the parent indicating that she had retained an attorney. A Pre-hearing Notification, dated October 3, 2002, was mailed to the parties by the IHO regarding a pre-hearing teleconference scheduled for October 8, 2002. A pre-hearing conference was conducted by telephone on October 8, 2002. On October 13, 2002, the IHO issued Pre-hearing Orders and Notification of Extension, which identified

the issue to be determined at the hearing. During the October 8, 2002 pre-hearing conference a joint request for an extension was made and granted such that a final decision was to be rendered on or before November 23, 2002. The hearing was set for November 7, 2002, and would be closed to the public at the Student's request. On November 4, 2002, a written request for an extension was received from the School because two witnesses were going to be unavailable due to family emergencies. The Student objected to the extension. On November 5, 2002, the extension was granted by the IHO, with the decision to be rendered on or before December 23, 2002. On November 12, 2002, the IHO notified the parties that a hearing was set for December 12, 2002, with the final decision to be completed on or before December 23, 2002. On December 11, 2002, the parties jointly requested an extension, as a witness for the Student was unable to attend the scheduled hearing. On December 19, 2002, the IHO issued a Notification of Change of Hearing Date, which granted an extension with the new hearing day set for January 24, 2003, and the final decision to be rendered on or before February 3, 2003. The IHO's December 19, 2002 Notification of Change of Hearing Date also notified the parties that: a pre-hearing conference would be held prior to the hearing in order to discuss procedural matters; the hearing would immediately follow the pre-hearing conference.

On January 16, 2003, the Student requested subpoenas be sent to four individuals. The IHO issued the subpoenas on January 17, 2003. On January 22, 2003 a Motion for Protective Order was received from legal counsel for the Indiana Department of Education. The Motion for Protective Order indicated that one of the individuals subpoenaed by the Student had been a complaint investigator on a complaint concerning the Student involved in this hearing. An affidavit indicated that the individual subpoenaed had no other knowledge of the Student. The Motion for Protective Order was granted. The Student objected to the issuance of the protective order.

The due process hearing was held on January 23, 2003. A pre-hearing conference was held immediately prior to the hearing to discuss procedural matters. The parties defined the issue for determination as follows:

1. Is the Student's current placement appropriate?

The Written Decision of the IHO

The IHO's written decision was issued on February 3, 2003. The IHO determined twelve (12) Findings of Fact. The IHO's Findings of Fact are reproduced, in part, as follows.

The Student is a 14-year-old male who is not currently enrolled in school. His mother testified that as of December 2002 she had decided to home-school the Student. His mother indicates that his home schooling has not yet begun. The Student moved into the school corporation in February 2001 from Florida. The Student had attended a private school in Florida and there was no current IEP from Florida at the time of enrollment in the Indiana school. The School

conducted an educational evaluation in September 2001. A case conference was held following the evaluation and found the Student eligible for special education services for a learning disability. At that time the Student was attending the public school in eighth grade. An IEP was developed addressing the Student's learning disability. On November 30, 2001, the Student was suspended from school, constituting his thirteenth cumulative day of suspension during that academic year. He had not been allowed to return to school after that time and into December 2001. On December 5, 2001, the School sent the parent a letter indicating that a manifestation determination had been conducted and it was found that the Student's misconduct that had brought about the suspensions was not a manifestation of the Student's disability. The parent did not challenge the determination. The parent was notified that the school was going to recommend expulsion. The School offered, as an option to expulsion, the option of enrolling the Student in an alternate program; however, the mother determined the program to be inappropriate and the Student continued to not receive educational services.

The mother filed a complaint with the Indiana Department of Education in December 2001. A complaint report was issued on February 1, 2002, ordering the School to convene a case conference committee meeting no later than February 13, 2002 to determine appropriate services and placement for the Student. The complaint report's orders continued by stating that regardless whether the Student was expelled or returning to school, the case conference committee was to identify the compensatory services to be provided to the Student as a result of the School's failure to provide services subsequent to the tenth cumulative day of suspension in mid-November and the School's failure to provide services since November up until the date of the complaint report.

A case conference was held on February 13, 2002. The Student was offered educational programming, including the ordered compensatory education. The programming was to occur at the special education co-operative's center during the time that the Student would be expelled during the remainder of the 2001-2002 academic year. The School received a letter from the mother on February 22, 2002 indicating that she was enrolling her son in a private school instead of the program offered by the School.

In July 2002 a psychological evaluation was conducted concerning the Student. Recommendations from the psychologist included consideration for special education services for an emotional disability. The Student began public school at the 9th grade level in August 2002. He was placed according to his last IEP in special education classes for a learning disability. A case conference committee was held on August 29, 2002 and reviewed the psychological evaluation of July 2002 as well as other sources of information. The Student had attended school for five days at the high school prior to the case conference committee's meeting. The case conference committee recommended that the Student's primary disability be changed to emotionally disabled with a learning disability as a secondary disability. The case conference committee also recommended that the Student receive services with a teacher

licensed for teaching in the area of emotional disabilities instead of working with the learning disability teacher. The parent did not agree to the proposed IEP that the School recommended on August 29, 2002. Thus, without the parent's permission to change placement, the Student continued in the learning disability placement as indicated in his last approved IEP that was created in 2001. The Student would often not attend school during the 2002 Fall Semester.

From these Findings of Fact, the IHO reached the following Conclusions of Law, which is reproduced verbatim.

Is the student's current placement appropriate?

Following a recommendation for the student's expulsion, the school was notified on February 22, 2002 that the parent was enrolling the student in a private school. At the beginning of fall semester, 2002, the parent re-enrolled the student in public school. The school was in compliance with Indiana Article 7 by providing special education services for a learning disability that was the disability identified in the most recently agreed upon IEP. Within five days of the student's return to public school, the school held a case conference and considered psychoeducational information from a new psychological evaluation and also reviewed the behaviors and progress during the student's first five days back at public school. The parent disagreed with the recommendations of the case conference committee and did not agree to the change in placement. Neither did the parent agree to the student's current placement.

No testimony or evidence from any expert in special education was presented at this hearing that would indicate that the proposed IEP provided by the school on August 29, 2002 was inappropriate. All expert testimony and evidence in this hearing supported a special education program for an emotional disability and a learning disability. It is therefore concluded that the school attempted to provide a Free Appropriate Public Education as required by Indiana Article 7. As the parent did not agree to the recommended program and had filed for a hearing, the school was in compliance with Article 7 by continuing to offer a free educational program for the disability identified in the last approved IEP.

Based on the foregoing, the IHO issued an Order, which is reproduced below:

1. The school is ordered to provide the educational program delineated in the 8/29/02 I.E.P., identifying the student as having a primary disability of an emotional disability and a secondary disability of a learning disability.

The IHO provided all parties with the appropriate notice of their right to seek administrative review.

APPEAL TO THE BOARD OF SPECIAL EDUCATION APPEALS

Petition for Review

The Student filed on March 4, 2003, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). The Petition for Review is reproduced, in part, as follows:

The one important issue he forgot is [the Student] will not leave the house to go to school. My landlord has sent me a letter the police cannot come to my home anymore - unless it is an emergency. And the police supervisor has called me and advised me cops will not come to get your child up and ready for school. I did say that in court or at the hearing and it was not dealt with. They could send a teacher to the home or they could put him in a residential program. How are they going to get him to go to school. [The Student] only attended Worthmore the latter part of seventh grade. He had no education 8th grade. Worthmore would not take him again for same reasons at public school.

The Response to the Petition for Review

The School filed on March 14, 2003, its Response to the Petition for Review. The School claims that the parent represented that the Student is not currently enrolled in Respondent's school and that the parent decided to home-school the Student. The School claims that it has received no request to re-enroll the Student in school nor has the parent ever contacted the School since the hearing and the IHO's decision.

The School claims that it conducted a case conference in August, 2002 that recommended that the Student receive services in the area of emotional disabilities instead of being assigned to the learning disability teacher as provided in the prior IEP. The School claims that it has not been able to institute this program because the parent filed for a due process hearing, which invoked the stay-put provisions of the law. Consequently, the Student was not in an appropriate placement during the first semester of the 2002-2003 school year and was not successful in that placement.

The School indicates that: (1) it is ready to implement the placement proposed in the August 2002 IEP, which the IHO found to be an appropriate placement; (2) if the parent wishes to re-enroll the Student in school, then the School will follow their normal procedures regarding enforcement of the compulsory attendance laws to assist the parent in securing the Student's attendance; and (3) until the Student is re-enrolled in the school, the School has no jurisdiction over him or his school attendance issues as the parent has accepted those responsibilities by withdrawing him from school and providing home-schooling.

The School argues that the Petition for Review does not present appropriate issues for resolution by the BSEA as the parent is not questioning the appropriateness of the placement or any other aspect of the

IHO's decision. The School indicates that while it is true that the parent mentioned the Student's absences from school during the first semester of the 2002-2003 school year, the Student was not in the appropriate placement due to the stay-put requirements. The School argues now that the IHO has cleared the way for the School to provide the appropriate program, and the attendance issues can be dealt with when the Student is re-enrolled in the School.

Review by the Indiana Board of Special Education Appeals

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by "Notice of Review Without Oral Argument," dated March 13, 2003. Review was set for March 17, 2003, in Bainbridge, Indiana. All three members of the BSEA appeared on March 17, 2003. After review of the record as a whole and in consideration of the Petition for Review, and the Response to the Petition for Review, the BSEA makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Student timely appeals from the decision of the IHO. The School timely responds. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-30-4(j).
2. Neither party asserts that the procedure employed by the IHO denied due process. Accordingly, the parties were provided their respective due process rights by the IHO in the conduct of this matter.
3. The IHO ordered the School to provide an educational program according to the 8/29/02 I.E.P., identifying the Student as having a primary disability of an emotional disability and a secondary disability of a learning disability. The IHO's order should be implemented.
4. The BSEA has no jurisdiction to compel attendance. Attendance was not an identified issue at the hearing and is therefore not an issue to be considered for appeal.
5. 511 IAC 7-30-4(d)(3) requires that any Petition for Review filed with the BSEA be "specific as to the reasons for the exceptions to the independent hearing officer's decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken[.]" The Student's Petition for Review is deficient in this regard. It does not identify any Finding of Fact, Conclusions of Law, or Orders of the IHO to which exception is taken. The BSEA must deny the Petition for Review.
6. All Findings of Fact, Conclusions of Law, and Orders are upheld.

ORDERS

In consideration of the foregoing, the Board of Special Education Appeals now issues the following Orders:

1. The decision of the Independent Hearing Officer is hereby affirmed.
2. Any additional issues or motions not specifically addressed herein are deemed denied or overruled, as appropriate.

Date: March 18, 2003

/s/ Cynthia Dewes
Cynthia Dewes, Chair
Board of Special Education Appeals

APPEAL STATEMENT

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from the receipt of this written decision to request judicial review in a civil court with jurisdiction, as provided by 511 IAC 7-30-4(n) and I.C. 4-21.5-5-5.